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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAIRO MARRUFO ALDECUA, Defendant and Appellant.	B238811 (Los Angeles County Super. Ct. No. LA 066880)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Gregory A. Dohi, Judge. Affirmed as modified.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Seth P. McCutcheon, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

A jury convicted defendant Jairo Marrufo Aldecua of three counts of continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5, subd. (a)), and one count of lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)), all felonies, and found true the multiple-victim allegations attached to each count. The trial court sentenced defendant to four consecutive terms of 15 years to life, gave defendant presentence custody credits of 385 actual days served plus 57 good time/work time credits, and made various other orders not at issue on this appeal.

Defendant contends the trial court erred in admitting evidence of his commission of other sexual offenses under Evidence Code section 1108, and also asserts he is entitled to an additional day of presentence custody credit. The latter contention is correct, but we find no error in the trial court's evidentiary ruling.

FACTS

Defendant offered to share his North Hollywood apartment with a couple and their two young girls, V.R. and J.R., sometime in 1995, and became the godfather of the younger daughter, J.R. Defendant began sexually molesting the older daughter, V.R., who was born in November 1991, when she was about five years old, about a year after the family moved in with defendant. Defendant began to ask V.R. to go to his bedroom and watch movies. Defendant began to be "more grabby, touchy"; he started touching V.R. on top of her clothing. "He would grab [her] vagina and [her] butt." He did this "[t]oo many [times] to count."

As time went by, defendant "started going underneath [V.R.'s] clothing." "He would . . . lure [her] into his room, lay [her] down on his bed, put a blanket over [her] and [they] would watch movies. But then he would sit down and he would start grabbing [her]." He would put his hands on her vagina. At first, his hand would be on her underwear on her vagina. This happened more than once. Later on, defendant would do the same thing, but underneath her clothing, touching her vagina itself. He would put his fingers inside the lips of the vagina. On one occasion, when her mother left her locked in the room while she went to a doctor's appointment, defendant put a knife in the door, opened it, and she woke up "to him on top of me"; she "had [her] underwear down and his penis was on my vagina." V.R. was about

six or seven years old when this happened. Defendant "just rub[bed] it up and down"; his penis was hard but she did not think he ejaculated.

The molestation of V.R. started when she was five years old (1996/1997) and ended when she was about 10 years old. V.R. remembered "getting so angry and upset that he was doing that to me until I finally, you know, realized that what the hell is this guy doing, it's not right . . . . [¶] And [she] just exploded and [she] got angry and [she] told him, 'You know what? This is wrong, stop.'" Defendant said, "'Fine, then I'm not going to give you any more things.'" V.R. told no one about the molestation, including her sister; she "was scared if [she] told [her] mom, that [defendant] would kick us out and we had nowhere to go."

V.R. moved out of defendant's apartment when she was 14. She did not tell anyone about the abuse until she was 19 years old, when she talked to the police about it in early 2011.

Defendant also molested J.R., V.R's younger sister, who was 17 at the time of trial. When J.R. was four or five years old (in 1998 or 1999), defendant "stuck his hands inside [her] pants," "inside [her] underwear." J.R. remembered only the one incident. J.R. moved out of defendant's apartment when she was 15. She did not tell anyone about the abuse until after the police contacted her in December 2010 or January 2011. At first, she denied to the police that anything had happened. Then she talked to V.R., and told her what happened. V.R. said she should tell the police, and she did. Before this, neither of the two sisters knew the other had been molested.

Meanwhile, defendant had also molested two other young girls.

Esmeralda A., the mother of V.R. and J.R., began to babysit for two girls, M.G. and A.G., in her home (defendant's apartment), in about 1998. The mother of the two girls, M.A., who lived nearby, brought them to the apartment every weekday afternoon. Defendant had known A.G. and M.G.'s father and his family for about 20 years, and introduced the two mothers to each other; defendant told Esmeralda that M.A. needed someone to care for her daughters, and Esmeralda agreed to do so. A.G. and M.G. knew defendant as "Primo" (cousin) or "Padrino" (godfather).

A.G. and M.G. were a couple of years younger than V.R. and J.R.; A.G. was born in September 1994, and M.G. in September 1995. The babysitting arrangement began when

A.G. was four years old and M.G. was three, and continued for three or four years. Defendant would call or gesture to A.G. to come into his room, and touch her on her vagina while she was sitting on his lap. This made A.G. feel uncomfortable and she would "get[] squirmy." This happened more than once, "as long as [she] was going there," meaning "as long as [she was] being babysat by Esmeralda." When defendant touched her vagina, his fingers would move. A.G. told no one; she thought her parents would think she was making it up, and that she'd "probably be in trouble."

M.G.'s story was much the same. The defendant, while sitting on his bed, would "turn [her] around and then touch [her] on [her] vagina . . . ." She did not remember whether the touching was over and underneath her clothing. Defendant's hand would move; M.G. demonstrated by wiggling three fingers (index finger, middle finger and ring finger). The touching would last a couple of minutes, and she did not remember exactly how many times this happened, but it was "[m]ore than five times."

When A.G. was 11 years old and in middle school, after she and her family had moved to Van Nuys, M.G. asked A.G. if she remembered Primo; that made A.G. uncomfortable and upset, and she did not want to talk about it. (M.G. said she told no one about the abuse until she was about eight years old, when she started to have nightmares and asked A.G. if it happened to her.) Then, when A.G. was 16, she and M.G. had an argument, and M.G. said the reason she was "always angry" was that when she was little, Primo molested her. The argument was loud, the girls' parents overheard it, everyone was upset, and the girls' aunt came and eventually took them to the police station. The subsequent investigation revealed that Esmeralda's daughters were also victims of defendant's abuse.

Defendant was arrested and charged by information in July 2011 with three counts of continuous sexual abuse of a child under the age of 14 years (A.G., M.G. and V.R), and one count of lewd act upon a child under the age of 14 years (J.R.).

At the trial, the victims testified to the facts described above. In addition, over defendant's objection, the court permitted the prosecution to present evidence from defendants' two daughters, I.M. and A.M., both of whom testified that defendant molested them when they were children.

I.M., defendant's older daughter, was born in 1977. I.M. last saw her father in 1991. When she was about eight years old, her father began to molest her, and the molestation continued for four or five years, until she was 12 or 13 years old. The first time, her father came into the restroom and "shower[ed]" I.M., putting soap in his hands and rubbing it on her "private part." As she got older, she would "wake up in his bed, [and her] mom would not be there." Defendant "would turn [her] on the side and do things to [her]," "most every morning[] when [her] mom would have to go to work early." Defendant would "rub his body, put his penis . . . in back of me." "I just felt his body against me and putting his penis between my – my – my buttocks, I could say." I.M. "just kept feeling this watery thing, sticky stuff," and her father would "just clean me off and putting my underwear back up." Defendant would come in when I.M. was in the restroom; she would hold onto the lock, but "he managed to bring in something, either a knife or something so he could slide it in and open it up." When he came in, he would put a towel on the floor, and "do the same thing as he would do in the bed[,] [p]ut his penis in back of me and push it inside until that sticky stuff will come out." This occurred "almost daily" until she was 12 or 13.

One morning when I.M. was 12 or 13, defendant tried to touch her and she did not let him do so. Defendant got angry and started choking her, saying, "You're going to see, bitch." Then he stopped choking her and told her to get ready for school. Defendant took the two sisters to school, and I.M. "kept seeing [her father's] face" and "kept crying that [she] wanted to stop." Her friends told her to see the counselor, and she did; this was the first time she had told anybody about the abuse. Then, the police came to her school and both I.M. and her sister were interviewed.

Defendant's other daughter, A.M., was five years younger than I.M. She testified that defendant "would always come and pick me up from my bed and take me to his bed. And he would take my clothes off and he would sexually abuse me." Defendant would take off A.M.'s underwear and have intercourse with her. She was five or six years old when the abuse began, and it occurred "almost every day" for three years. Sometimes in the afternoons defendant would shower A.M. and touch her vagina and chest area with his hands. Defendant would ejaculate and then clean A.M. up with toilet paper. One time A.M. "was struggling"

and "didn't want to go to his bed." Defendant "slapped [her] so hard that [she] landed on the metal part of the bed and he bruised [her] face." Defendant did not send A.M. to school that day.

A.M. told no one about the abuse. It ended in 1991, when I.M. told her counselor and the police came to school. Until this trial, neither I.M. nor A.M. had seen their father since that day in 1991 when the police interviewed them. Defendant was arrested and the case was investigated and referred to the district attorney's office, but no charges were filed.

The jury convicted defendant on all charges, and the court sentenced him to four consecutive terms of 15 years to life, giving defendant 442 days of credit for time served and good time/work time. Defendant filed a timely appeal.

DISCUSSION

Defendant's contention the trial court erred in admitting the testimony of defendant's daughters under Evidence Code section 1108, depriving him of due process of law, has no merit.

The applicable principles are settled. Evidence Code section 1101 makes evidence of a person's character, including in the form of specific instances of his or her conduct, inadmissible except when relevant to prove some fact other than the person's disposition to commit a crime or civil wrong, and except as provided in specified sections of the Evidence Code, including Evidence Code section 1108. (Evid. Code, § 1101, subds. (a) & (b).) Evidence Code section 1108 provides that, in a criminal action accusing the defendant of a sexual offense, "evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

Thus, the Supreme Court tells us, trial courts "may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352." (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.) Under Evidence Code section 352, the court has the discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a)

necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

In the context of Evidence Code section 1108, trial court judges "must consider such factors as [the sex offense's] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) The trial court's ruling is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Here, the trial court engaged in exactly the sort of "careful weighing process" described in *People v. Falsetta*. The court said:

> ". . . I am going to find that these prior acts are admissible.
>
> "Counsel brings out the fact that the acts involving the defendant's own daughters were not charged, they don't have to be. [Citation.]
>
> "Counsel brings out that there's some differences because violence was used in the prior alleged acts and in the charged alleged acts ruses were involved. [¶] [Evidence Code section] 1108, however, doesn't require the same levels of similarity nor do I have to engage in the analysis of levels of similarity as I would under [Evidence Code section] 1101[, subdivision (b)]. The [Evidence Code section] 352 analysis, however, of course, does have to be that rigid.
>
> "Counsel raised, I believe, a very valid point that the uncharged acts that are older are more inflammatory than the charged acts are. We're talking about allegations of violence against one's own daughter, those are more prejudicial. [¶] Nevertheless, the prejudicial effect needs to substantially outweigh the probative value and I'm finding that it – the prejudice does not substantially outweigh the probative value in this particular case.

> "A sort of circumstance under which that analysis has been held to an example of a case where a judge should have kept prior acts out in the [Evidence Code sections] 1101 – 1108 context [*People v. Harris* (1998) 60 Cal.App.4th 727]. [¶] In that case, a mental health nurse was accused of offenses involving his patients and they brought in that case evidence of a very violent prior sexual offense that happened a long time ago. It involved a vicious attack on a stranger. It was a 23-year-old event. [¶] . . . [¶]
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> "So the analysis of similarity has some value here. Here we're talking about offenses on the same types of victims, minors, to whom the defendant had access, who's familiar with them, not total strangers. [¶] And the extent of the violence involved in the allegation that the People intend to prove up through the defendant's daughters does not rise to the level of the violence involved in the [*Harris*] case.
>
> "So there's an issue as to the passage of time. A recent case actually touches on that. [*People v. Miramontes* (2010) 189 Cal.App.4th 1085.] There was a four-year gap there. [¶] And the People in their papers cite the [*Branch*] case [*People v. Branch* (2001) 91 Cal.App.4th 274] in which there was a 30-year gap. The length of time is not so great as to make the evidence of the prior offenses irrelevant.
>
> "I don't think it's going to be a major consumption of time. We're talking about two witnesses, possibly three, and I trust that counsel will ask directed and pointed questions, and it's two civilian witnesses.
>
> "So I am finding under [Evidence Code section] 352, balancing that the prejudicial effect does not substantially outweigh the probative value and this is under [Evidence Code section] 1108 . . . ."

Defendant contends the incidents involving defendant's daughters were remote, inflammatory, dissimilar, and uncharged, and concludes that admission of the testimony had "little probative value" and its "only purpose was to show [defendant] in the most vile light possible as a father who would sexually abuse, rape, hit, choke and slap his children." We do not agree with defendant's analysis.

The molestation of defendant's daughters was not in fact remote in time because, although it began 26 years before trial, it did not end until 1991, and defendant started molesting the present victims in about 1997 (when V.R., who was born in November 1991, was five years old). Nor were the sexual offenses dissimilar. All the victims were young girls under age 14 to whom defendant had ready access, who lived in or spent substantial amounts of time in his home on a regular basis. All the victims had a familiar relationship with defendant. The uncharged conduct involved defendants' daughters, and the charged conduct involved defendant's goddaughter, her sister, and the daughters of defendant's long-time friend who referred to defendant as cousin or godfather. All the incidents involved defendant touching and rubbing the victims' vaginas.

The trial court expressly considered the inflammatory nature of the daughters' evidence: that the uncharged conduct went beyond touching to intercourse, and to incidents of violence when the daughters resisted. The trial court observed that the uncharged acts *were* more inflammatory than the charged acts, and thus "those are more prejudicial." But that factor was one of several, and the trial court, after acknowledging the inflammatory nature of the uncharged acts, concluded that "[n]evertheless, the prejudicial effect needs to substantially outweigh the probative value" and that it did not do so "in this particular case."

In short, the trial court carefully weighed the applicable factors, and concluded the evidence was admissible. We agree with the trial court, but even if we did not, we may reverse its ruling only if the ruling was "'arbitrary, whimsical, or capricious as a matter of law.'" (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 282.) It was none of those things, and so we affirm the judgment.

Defendant points out, and respondent concedes, that he was awarded 385 days of actual custody credits (plus 57 days of conduct credits), but was in custody for 386 days (from January 4, 2011, until his sentencing on January 24, 2012). Consequently he is entitled to an additional day of custody credit, and the abstract of judgment should be so amended.

DISPOSITION

The matter is remanded to the trial court with directions to modify the abstract of judgment to reflect that defendant has earned a total of 443 days of presentence credit (386 actual and 57 local conduct). The trial court is directed to forward the modified abstract to the Department of Corrections and Rehabilitation. The judgment as modified is affirmed.

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GRIMES, J.

WE CONCUR:

FLIER, Acting P. J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.